

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 226 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

STATE OF GUJARAT

Versus

TANDEL ABUSMAN

Appearance:

Shri M.A.Bukhari, Additional Public Prosecutor, for the Appellant.

Shri A.J.Shastri, Advocate, for the Respondents.

CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 23/09/96

ORAL JUDGEMENT

The judgment and order of acquittal passed by the learned Judicial Magistrate, First Class, at Porbandar on 11th January 1991 in Criminal Case No.252 of 1990 is under challenge in this appeal under Section 378 of the

Code of Criminal Procedure, 1973 (the Code for brief) by leave of this court. By his impugned judgment and order, the learned trial Magistrate acquitted the respondents herein of the offences punishable under section 14 read with Section 3 of the Foreigners Act, 1946 and Section 3 of the Passport Act, 1967.

2. The facts giving rise to this appeal move in a narrow compass. During the course of patrolling, the Coast Guards of the Customs Department spotted one foreign ship. They suspected its containing some contraband gold and attempting to transfer that gold in India surreptitiously. The respondents were found in the ship. It is the case of the prosecution that gold was jettisoned by them. The foreign ship was brought to Porbandar. It appears that the Customs Department reported the matter to the Deputy Superintendent of Police who in turn directed the Police Inspector of 'B' Division at Porbandar to lodge a complaint against the respondents herein charging them with the offences punishable under Section 14 read with Section 3 of the Foreigners Act, 1946 and under Section 3 of the Passport Act, 1967. Thereupon, a chargesheet was presented before the Court of the Chief Judicial Magistrate at Porbandar. It came to be registered as Criminal Case No.252 of 1990. It was assigned to the Judicial Magistrate, First Class, at Porbandar for trial and disposal. The charge against the respondents herein as the accused was framed on 26th March 1990 at Exh.3 on the record of the case. No accused pleaded guilty to the charge. They were thereupon tried. After recording the prosecution evidence and after recording the further statement of each accused, by his judgment and order passed on 11th January 1991 in the aforesaid criminal case, the learned trial Magistrate acquitted all the accused of the offences with which they stood charged. That aggrieved the prosecution agency. It has therefore preferred this appeal under Section 378 of the Code after obtaining leave of this court for the purpose.

3. The learned trial Magistrate has found that the evidence on record was not clear enough to show as to at what point in the high seas the ship housing the present respondents was caught. It is an admitted position on record that the respondents herein were travelling in a foreign ship. Their ship was found on high seas. It was to be established at trial that the ship in question was within the territorial waters of India.

4. It cannot be gainsaid that the limit of the territorial waters of India is shown to be at a distance

of 12 nautical miles from the nearest point of the appropriate baseline as provided in Section 3 (2) of the Territorial Waters, Continental Shelf, Exclusive Economic Zone & Other Maritime Zones Act, 1976. It was therefore necessary for the prosecution to have established that the respondents herein had entered the territorial waters of India without any valid passport or valid permit in order to fasten criminal liability under the Foreigners Act and under the Passport Act. The evidence on record is completely silent on the point. The complaint at Exh.20 on the record of the case does not disclose any point of their being found on the high seas. The relevant column in the report made by the Boarding Officer on 9th October 1989 with respect to distance from nearest Indian land mark was found blank. Again, that document was not proved and it has not come on record. In that view of the matter, it would be very difficult to come to the conclusion that the respondents herein were found within the territorial waters of India at the relevant time. The learned trial Magistrate was right in acquitting them of the offences punishable under the aforesaid two enactments.

5. A disturbing feature in this case deserves to be noted. It is a settled principle of law that offences under the Foreigners Act, 1946 are cognizable and non-bailable. They would be governed by the relevant provisions contained in the Code with respect to cognizable offences. The concerned Police Officer was required to investigate into cognizable offences in view of Section 156 thereof. The complainant was examined at Exh.19 on the record of the case. He has clearly admitted that no investigation whatsoever had taken place in the case giving rise to the proceeding before the learned trial Magistrate. No statement of any witness was recorded in the case. This is a highly disturbing situation.

6. It is not in dispute that the incident took place on 8th October 1989. Learned Advocate Shri Shastri for the respondents herein states at the Bar that the respondents were practically in custody since that date. I am informed that they were asked not to move out and they were given jail treatment till they were in fact arrested in accordance with the relevant provisions contained in the Code on 12th October 1989 as transpiring from the material on record. It appears that, by the order of the learned trial Magistrate, they were not kept in jail but they were required not to leave the Police Head Quarters at Porbandar. That situation continued even during the pendency of this appeal. It would mean

that they have been languishing in confinement for nearly seven years. The maximum punishment under Section 14 of the Foreigners Act, 1946 for an offence punishable inter alia for contravention of Section 3 thereof is imprisonment for five years and that of Section 3 of the Passport Act is six months. Even if the maximum sentence under both the enactments is required to be imposed and they are not required to run concurrently, the maximum sentence to which the respondents herein could be subjected would be five-and-half years. The respondents herein have spent nearly seven years in confinement from the date of their detention in India on and from 8th October 1989 or from the date of their arrest on 12th October 1989 for no offence found to have been committed by them or any of them. They would be entitled to acquittal also on this ground alone.

7. In view of my aforesaid discussion, I have found no merit or substance in this appeal. The impugned judgment and order of acquittal passed by the learned trial Magistrate calls for no interference by this court in this appeal.

8. In the result, this appeal fails. It is hereby dismissed. The respondents are ordered to be released from confinement forthwith if no longer required for or in any other case.

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